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No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit, Unit "B"

BRIEF FOR PETITIONER NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

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QUESTIONS PRESENTED FOR REVIEW

The Interstate Commerce Act authorizes, but does not compel, motor common carriers of property to engage in the collective formulation of interstate rate proposals pursuant to agreements approved by the Interstate Commerce Commission. The North Carolina Public Utilities Act authorizes, but does not compel, motor common carriers of property to engage in the collective formulation of intrastate rate proposals pursuant to agreements approved by the North Carolina Utilities Commission. Against this background, the questions presented are:

1. Whether, in disregard of controlling decisions of this Court involving the state action doctrine, the court below erroneously inferred a Congressional intent to condemn under the federal antitrust laws activities conducted in intrastate commerce which are expressly authorized and immunized from those laws when conducted in interstate commerce?

2. Whether, contrary to prior decisions of this Court, the court below erroneously construed the state action doctrine to require as a prerequisite to its application that a state formally compel private parties to act in a manner violative of federal antitrust laws?

3. Whether, contrary to prior decisions of this Court, the court below erroneously held that the *Noerr-Pennington* doctrine is inapplicable to the collective formulation of rates to be proposed to state regulatory commissions?*

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* This brief addresses Questions 1 and 2. As to Question 3, petitioner North Carolina Motor Carriers Association, Inc. concurs with and adopts the brief of petitioner Southern Motor Carriers Rate Conference, Inc.

PARTIES

The caption of this brief contains the names of all parties to this action in the Fifth Circuit. One Defendant, Motor Carriers Traffic Association, Inc., did not appeal from the ruling of the District Court. North Carolina Motor Carriers Association, Inc. has no parent, subsidiary or affiliated companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
Procedural History	3
Statement Of Facts	7
SUMMARY OF ARGUMENT	11
ARGUMENT	13
Congress Did Not Intend To Forbid Under The Antitrust Laws Activity In Intrastate Commerce That It Permits In Interstate Commerce	13
Compulsion On Private Persons To Act Anticompetitively Is Not A Prerequisite To Immunity For Their Actions	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

California Retail Liquor Dealers Association v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ..... *passim*

Cantor v. *Detroit Edison Co.*, 429 U.S. 579 (1976) 12, 17, 19, 20

Goldfarb v. *Virginia State Bar Association*, 421 U.S. 773 (1975) 17, 19

Hoover v. *Ronwin*, ___ U.S. ___, 104 S.Ct. ___, 80 L.Ed.2d 590 (1984) 12, 19, 20

Parker v. *Brown*, 317 U.S. 341 (1943) 5, 13, 16, 17, 19

Turf Paradise, Inc. v. *Arizona Downs*, 670 F.2d 813 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (1982) 19

STATUTES:

The Sherman Act, 15 U.S.C. § 1 ..... 2, 3

The Interstate Commerce Act:

Former Section 5a, former 49 U.S.C. § 5b, 62 Stat. 472 14

49 U.S.C. § 10521(b) 14

49 U.S.C. § 10706(b) 9, 13

49 U.S.C. § 10706(d)(2) 14

North Carolina General Statutes:

§ 62-2 8

§ 62-130 8

§ 62-139 8

§ 62-140 8

§ 62-146(b) 8

§ 62-152.1 ..... 8, 9

§ 62-152.1(b) 2, 8

§ 62-152.1(c) 8

§ 62-152.1(f) 9

§ 62-152.1(h) 3, 8

§ 62-259 ..... 7, 8

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BRIEF FOR PETITIONER NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia (Pet. App. 1a-30a) is reported at 467 F. Supp. 471 (N.D. Ga. 1979). The opinion of the Fifth Circuit, Unit "B" (Pet. App. 31a-60a) is reported at 672 F.2d 469 (5th Cir. Unit "B" 1982). The opinion of the Fifth Circuit, Unit "B" on rehearing *en*

banc (Pet. App. 63a-93a) is reported at 702 F.2d 532 (5th Cir. Unit "B" 1983).

JURISDICTION

The judgment of the Fifth Circuit, Unit "B", was entered on April 5, 1982. A petition for rehearing and suggestion for rehearing *en banc* was granted on June 7, 1982. The *en banc* judgment of the Fifth Circuit, Unit "B", was entered on April 11, 1983. On April 21, 1983, petitioners moved the Fifth Circuit, Unit "B", for a stay pending the filing of a petition for writ of certiorari. On May 6, 1983 that court granted the motion and stayed its mandate through May 30, 1983. The petition for a writ of certiorari was filed on May 27, 1983, and granted on June 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 62-152.1(b) of the North Carolina Public Utilities Act provides:

> (b) For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier subject to regulation by this Commission and party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges (including charges be-

> tween carriers and compensation paid or received from the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by subsection (d) or (e) of this section) if it finds that, by reason of furtherance of the transportation policy and goal declared in this section and in G.S. 62-2 or G.S. 62-259 as may be pertinent, the relief provided in subsection (h) shall apply with respect to the making and carrying out of such agreement; otherwise, the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this subsection.

Section 62-152.1(h) of the North Carolina Public Utilities Act provides:

> (h) Parties to any agreement approved by the Commission under this section and other parties are, if the approval of such agreement is not prohibited by subsection (d) or (e) of this section, hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with the terms and conditions prescribed by the Commission.

STATEMENT OF THE CASE

Procedural History

Respondent United States (hereinafter Government) brought suit in the United States District Court for the Northern District of Georgia seeking an injunction against alleged violations of Section 1 of the Sherman Act,

15 U.S.C. § 1. Named as defendants were three organizations of motor common carriers of property, commonly known as rate bureaus, operating in Alabama, Georgia, Mississippi, North Carolina and Tennessee. In addition to petitioner North Carolina Motor Carriers Association, Inc., which operates only in North Carolina, the complaint named the Southern Motor Carriers Rate Conference, Inc. and the Motor Carriers Traffic Association, Inc. The gist of the complaint was that these bureaus were serving as forums through which their members conspired to fix prices by collectively formulating rate proposals to be filed with the regulatory commissions of the five states. Complaint ¶¶ 24-25 (J.A. 9-10).

The bureaus filed motions to dismiss for failure to state a claim upon which relief could be granted, and for lack of subject matter jurisdiction. The Government filed a motion to strike certain affirmative defenses. In an order reported at 439 F. Supp. 29 (R.404), the District Court denied the bureaus' motions and struck certain affirmative defenses. In its order the Court invited the Attorneys General of the five states to participate as *amici curiae* (R. 434-435). 439 F. Supp. at 52.

The National Association of Regulatory Utility Commissioners (NARUC) was granted intervention as a party-defendant by the District Court (J.A. 43-48). The motion of National Motor Freight Traffic Association, Inc. (NMFTA) to intervene as a defendant was denied, but NMFTA was invited by the Court to participate as *amicus curiae* (R. 1139).

The Government and the three rate bureaus entered into a stipulation of facts (J.A. 39-42), and following the completion of discovery the parties filed cross-motions for summary judgment. The bureaus, supported by NARUC and the *amicus curiae* briefs of the five states and

NMFTA, argued, *inter alia*, that their conduct was immune from the federal antitrust laws by virtue of the state action doctrine established in *Parker* v. *Brown*, 317 U.S. 341 (1943).

The District Court granted the Government's motion for summary judgment. The Court held that the state action doctrine did not apply because none of the five states expressly compels collective rate formulation by motor common carriers. It held that the absence of such compulsion is "a threshhold barrier to application of the state action doctrine" (Pet. App. 18a). The District Court then held that the challenged activities constituted price fixing in violation of the Sherman Act notwithstanding that the state regulatory agencies themselves fix the rates of motor common carriers—either by prescribing them or by approving, after a process of active oversight, those proposed by carriers. The Court concluded that the "defendants' practices of collective rate coordination and publication are *per se* violations of Section 1, subject to injunction by this court" (Pet. App. 28a).

On appeal, a divided panel of the Fifth Circuit, Unit "B" affirmed. Judge Johnson, joined by Judge Scott of the Middle District of Florida, sitting by designation, agreed with the District Court that a court need look no further than to determine whether the challenged activity is compelled by the state acting as sovereign. Judge Hill dissented on the ground that this case is governed by the two-pronged test set forth in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which was decided after the District Court decision.[1] Since it was conceded that there was "active

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[1] In *Midcal* this Court set forth the following test for state action:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. 445 U.S. at 105.

supervision",[2] Judge Hill addressed "clear articulation". He found that the North Carolina statutory provisions "unmistakenly indicate that collective rate formulation is part of the regulatory policy of the State of North Carolina" (Pet. App. 58a). Accordingly, Judge Hill would have held the activities of the rate bureaus in that state immune (Pet. App. 58a).

The Fifth Circuit granted rehearing *en banc* to consider the following two issues: "first whether a private party may avail itself of the state action exception to federal antitrust laws only if the state compels it to perform the disputed actions; and second whether, if state compulsion is not necessary, the state policies here at issue were sufficiently clearly articulated and affirmatively expressed for the state action exception to apply" (Pet. App. 64a). On rehearing, a divided court affirmed, 8-4. Judge Johnson, again writing for the majority, reiterated his view that the Court need not reach the second issue because "compulsion is required of private parties." Judge Hill, again in dissent, pointed to the conflict between the holding of the majority and the "clear and explicit" holding of this Court in *Midcal* (Pet. App. 84a).

Judge Clark, who joined Judge Hill's dissent, also wrote a separate dissent in which he expressed his concern about the unfairness of the result reached by the majority:

> What disturbs me so deeply about the majority opinion is that it completely ignores the Interstate Commerce Act, public policy, history, and fairness. As pointed out by Judge Hill, the functions of rate bureaus or conferences declared illegal by the majority have been accepted national policy for more than

[2] See Pet. App. 37a, note 5 and Pet. App. 57a, note 6.

> thirty years. These same defendants have performed the identical functions for interstate carriers whose rates are fixed by the Interstate Commerce Commission. These functions, when performed by these bureaus for interstate carriers are exempted from the Antitrust Act by the Interstate Commerce Act. . . .
>
> It is patently unfair at this late date to declare that these defendants violated the antitrust act when following identical procedures that are not violative of the antitrust act when done in interstate commerce (Pet. App. 92a-93a, footnote omitted).

Statement of Facts

Motor common carriers of property operating in intrastate commerce in North Carolina are deemed public utilities and, by virtue of the North Carolina Public Utilities Act, Chapter 62 of the North Carolina General Statutes (NCGS), their intrastate rates and services are subject to pervasive economic regulation. North Carolina's policy underlying her regulatory scheme, set forth in NCGS § 62-259 is to:

> . . . promote and preserve adequate, economical and efficient service to all communities of the State by motor carriers; to encourage and promote harmony among all carriers and to prevent discrimination, undue preferences or advantages, or unfair or destructive competitive practices between all carriers; to foster coordinated statewide motor carrier service; and to conform with the national transportation policy and the federal motor carriers acts insofar as the same may be practical and adequate for application to intrastate commerce.

To carry out this policy the Utilities Act vests regulatory authority over motor carriers in the North Carolina Utilities Commission (NCUC). The NCUC is charged with the exclusive responsibility to fix and establish rates for all motor common carriers subject to its jurisdiction.

Specifically, the NCUC is required to "make, fix, establish, or allow just and reasonable rates." NCGS § 62-130. Carriers are not permitted to deviate from the rates so made. Nor are they permitted to discriminate against particular persons, localities or classes of service. NCGS §§ 62-139, 62-140. Carriers of property over regular routes must maintain through routes and joint rates with other such carriers. NCGS § 62-146(b).[3]

An integral feature of North Carolina's rate regulatory scheme is NCGS § 62-152.1, which sets forth a procedure "to realize and effectuate" the following clearly articulated policy: "For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class." NCGS § 62-152.1(b). The procedure authorizes motor common carriers to enter into collective ratemaking agreements and to apply to NCUC for approval of those agreements. Approval immunizes the parties to an agreement from the North Carolina antitrust laws with respect to the making and carrying out of the agreement in conformity with the terms and conditions prescribed by the Commission. NCGS § 62-152.1(h). The NCUC may approve only agreements which satisfy the specific criteria set forth in NCGS § 62-152.1 and which are found to be in furtherance of the uniform rate policy and the other regulatory policies set forth in NCGS §§ 62-2 and 62-259.

NCGS § 62-152.1(c) requires approved rate bureaus to maintain such records and to file such reports as the

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[3] A "through route" is an arrangement between connecting carriers for the continuous carriage of goods from an origin on the line of one to a destination on the line of another. A "joint rate" is a rate applied jointly by the carriers party to a through route covering the carriage of goods from origin to destination.

NCUC may require. In addition, the NCUC is authorized to investigate bureaus to determine if they are acting in accord with regulatory policy and standards, and to modify any approved agreement to the extent necessary to insure conformity with that policy and those standards. NCGS § 62-152.1(f).

The North Carolina Motor Carriers Association (NCMCA) operates pursuant to an agreement among approximately 170 motor common carriers of property approved by the NCUC under NCGS § 62-152.1 (R. 1315, 1340). Continuously since 1943, it has served as the forum through which its members collectively formulate rate proposals to the NCUC, while also serving as their agent for the publication of rates in tariff form and for the filing of tariffs with the NCUC.

NCGS § 62-152.1 is modeled on its federal counterpart, former 49 U.S.C. § 5b, amended and recodified at 49 U.S.C. § 10706(b), which expressly immunizes from the federal antitrust laws collective ratemaking by motor common carriers of property under agreements approved by the Interstate Commerce Commission. Accordingly, the NCMCA agreement establishes ratemaking procedures which are in all important respects identical to those in ICC-approved agreements (R. 1268-1269). Rates are formulated in a rate committee on which each member of NCMCA is entitled to have a representative (R. 1315-1316). Meetings of the committee are open to users of transportation services — shippers and receivers — and they participate with carriers in the discussion of rate proposals (R. 1316). From 1947 to 1978, approximately ninety percent of the motor carrier rate proposals to the NCUC were formulated through NCMCA or one of the other two rate bureaus named in the Government's complaint (J.A. 56).

The NCUC has a large staff which thoroughly reviews all rate proposals formulated through NCMCA (J.A. 58-60). In addition, it has an independent arm, known as the Public Staff, which represents the consuming public in the establishment of public utility rates (J.A. 50-51). The Public Staff also reviews and analyzes all rate proposals made by NCMCA and makes recommendations thereon to the NCUC (J.A. 51-53). The NCUC sets for formal hearing all proposals for general rate increases (J.A. 59) and all other proposals the Public Staff recommends be formally heard (J.A. 58).

The Director of the Transportation Division of NCUC and the Coordinator, Accounting Traffic Section of the Public Staff both submitted affidavits to the District Court setting forth their support for collective rate proposing and describing NCMCA's essential role in the scheme of regulation (J.A. 50-61). In addition, the State of North Carolina, through its Office of Attorney General, and the NCUC filed joint *amicus curiae* briefs with the Court of Appeals and this Court explaining why the collective formulation of rate proposals to NCUC is necessary to the effectuation of North Carolina's rate regulatory scheme. As they pointed out at page 12 of their brief in support of the petition for writ of certiorari:

> An examination of the North Carolina Public Utilities Act discloses that the State of North Carolina has chosen, in furtherance of its overall motor carrier transportation policy, to substitute the regulation of motor carrier rates for competition. The economic regulation of motor carrier rates by the State is in furtherance of the expressly announced goals to provide just and reasonable rates for motor carrier transportation without unjust discrimination or undue preferences; to promote and preserve adequate economical and efficient service to all the communities of the State by motor carriers; and to foster a

> coordinated statewide motor carrier service. . . . The State should retain the freedom to pursue its regulatory policies with such flexibility as will meet the needs of its citizens. If the decision of the District Court is left undisturbed, the State of North Carolina will be required to abandon its regulatory scheme of determining carrier rates by collective rate proposing and to determine carrier rates based upon the separate rate applications of more than 600 individual motor carriers. The result will be the inability of the State of North Carolina to discharge its duty to ensure that motor carrier rates are just, reasonable, and nondiscriminatory.

SUMMARY OF ARGUMENT

The state action doctrine is grounded on the proposition that while Congress has the power to preempt state regulation of intrastate commerce affecting interstate commerce, an unexpressed purpose to do so is not to be lightly inferred. Notwithstanding that Congress expressly reserved to the states the power to regulate intrastate motor carrier transportation, the Court below held that Congress intended to nullify state laws which exercise that power in the same manner as the federal government exercises its power to regulate interstate motor carrier transportation.

The Interstate Commerce Act immunizes from the antitrust laws the collective formulation of interstate rates by motor common carriers pursuant to agreements approved by the Interstate Commerce Commission. Such agreements *must guarantee* each carrier the absolute right to take independent action. The Court below held that petitioner's agreement, which was approved by the North Carolina Utilities Commission under a law modeled after the Interstate Commerce Act, could not immunize the collective formulation of intrastate rates unless it

forbids carriers to take independent action. Thus, the Court held that a state has only one of two choices—either permit absolutely free competition or eliminate competition altogether.

The Court below held "[s]pecifically, a defense of state action fails because this litigation was brought against private defendants" rather than state defendants. (Pet. App. 71a). This elevates form over substance because it holds that immunity from the antitrust laws *vel non* depends on whether a plaintiff chooses to sue an officer of the state or a private person.

Only last term in *Hoover* v. *Ronwin*, ___ U.S. ___, 104 S.Ct. ___, 80 L.Ed.2d 590 (1984), the Court stated that when anti-competitive activities are carried out, not by the state itself, but "by others pursuant to state authorization," it must be determined whether those others are acting pursuant to a clearly articulated and affirmatively expressed state policy and whether the state actively supervises their activities. 80 L.Ed.2d at 599.

In stating its test in *Midcal* and restating it in *Hoover*, this Court examined all of its major decisions dealing with the state action doctrine. Included were cases involving private defendants as well as cases involving public defendants. Indeed, in *Hoover*, the Court pointed out that it had applied that test in both *Midcal*, in which the defendant was a state agency, and *Cantor* v. *Detroit Edison Co.*, 429 U.S. 579 (1976), in which the defendant was a private party. Thus, the Court clearly rejected the basic premise upon which the decision below rests.

ARGUMENT

Congress Did Not Intend To Forbid Under The Antitrust Laws Activity In Intrastate Commerce That It Permits In Interstate Commerce

Since its 1943 decision in *Parker* v. *Brown*, *supra*, this Court has recognized that Congress did not intend the antitrust laws to deprive the states of their sovereign power to regulate intrastate commerce as they see fit. That decision establishing antitrust immunity for state regulatory programs was "grounded in our federal structure. 'In a dual system of government in which, under the Constitution, the states are sovereign, save only as congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to congress' " *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 103 (quoting *Parker* v. *Brown*, 317 U.S. at 351). In short, the basic *Parker* proposition is that, while Congress has the power to preempt state economic regulation, an intent to do so will not be inferred absent clear evidence. Applying that proposition here, it is clear that the decision below necessarily infers that the Sherman Act condemns intrastate activities which are the same as the interstate activities Congress expressly authorized and immunized under the Interstate Commerce Act.

The Interstate Commerce Act authorizes, but does not compel, motor common carriers operating in interstate commerce to engage in the collective formulation of rates pursuant to agreements filed with and approved by the Interstate Commerce Commission. The ICC's approval of an agreement immunizes from "the antitrust laws" the "parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. § 10706(b).

In the five states involved in this proceeding and most other states, the collective formulation of rate proposals is authorized, but not compelled, by statute or administrative rule or policy. North Carolina has adopted a statute which authorizes the collective formulation of rate proposals and immunizes that activity from its antitrust laws in language that is virtually identical to former Section 5a of the Interstate Commerce Act, former 49 U.S.C. § 5b, 62 Stat. 472. The provisions relating to collective formulation of rate proposals are designed to parallel and complement the federal provisions relating to collective rate formulation. Hence, it is plainly untenable to infer, as the Court below did, that Congress intended to preempt state law designed to effectuate in intrastate commerce the same policies that the federal law is designed to effectuate in interstate commerce. The illogic of the Court's holding is underscored by the anomaly that the same carriers which *do not* violate the federal antitrust laws when they collectively formulate an interstate rate for the Raleigh, N.C. to Charlotte, N.C. leg of an interstate shipment *do* violate those laws when they collectively formulate an intrastate rate for an intrastate shipment of the same commodity moving between the same points in the same truck at the same time.

Congress expressly reserved to the states the power "to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. § 10521(b). Yet, under the decision below, the states cannot exercise this power in the same manner as the federal government exercises its power over interstate motor carriers. Under 49 U.S.C. § 10706(d)(2), the Interstate Commerce Commission "may not approve an agreement . . . establishing a procedure for determination of a matter through joint consideration unless the Commission finds that each party to the agreement has the absolute right under it to take inde-

pendent action before or after a determination is made under that procedure." Under the decision below, the *inclusion* of such a provision in an agreement results in the *loss* of antitrust immunity.

The Court below blithely suggested that "if collective ratemaking is as desirable as appellants insist, then it should be but a small step for the states to compel it of all carriers" (Pet. App. 80a). But, as the Government itself points out, "there would presumably be less competition if the states did so, since some carriers now file individual rates . . . ." (Brief for the United States in Opposition to Petition For A Writ of Certiorari, 16). Thus, both the Court below and the Government here are saying that the states can bring their regulatory schemes into consonance with the federal antitrust laws only by eliminating competition altogether.

It is inconceivable that Congress intended the antitrust laws to be applied to produce such a result. Only recently, Congress indicated that it was aware of the existing schemes under which the various state provisions relating to collective rate formulation parallel and complement the federal provisions, and it made a deliberate determination to maintain the status quo with respect to those schemes. In the legislative history of the Motor Carrier Act of 1980, there is a discussion of collective formulation of intrastate rates *without* specific authorization from the states involved. The following appears at page 29 of the House Report:

> In the bill as originally introduced, there was a provision which prohibited the rate bureaus from docketing or handling rates for intrastate transportation without specific authorization from the states involved. The Committee eliminated this section because it received very little evidence on that particular subject. The Committee intends to continue look-

ing at this area, but for the time being, the status quo should apply with respect to intrastate ratemaking. H.R. Rep. No. 1069, 96th Cong., 1st Sess. *reprinted in* 1980 U.S. Code Cong. & Admin. News 2283, 2311.

Compulsion On Private Persons To Act Anticompetitively Is Not A Prerequisite To Immunity For Their Actions

The Court below held that "[s]pecifically, a defense of state action fails because this litigation was brought against private defendants and none of the states in question compels the ratemaking bureaus to set rates collectively" (Pet. App. 71a). It stated that "*Parker* immunity for state defendants does not require compulsion" (Pet. App. 74a). The illogic of this wooden compulsion test is clear from the facts of this case. Suppose some party, *e.g.*, a disgruntled shipper or carrier or the Department of Justice, had judicially challenged the NCUC's decision to approve the NCMCA agreement on the ground that approval was barred by the federal antitrust laws. Under the Court's thesis, *Parker* immunity would be found because the state has clearly articulated its policy and actively supervises the implementation of that policy. How can the opposite result be reached because NCMCA rather than the NCUC is the defendant? This elevates form over substance and leaves in the hands of plaintiffs the power to determine the applicability of federal antitrust laws. Indeed, under this thesis *Parker* itself would have been decided differently had the defendant been a private party instead of a state official. This conclusion is untenable.

In *Parker* the Court considered a California statute that authorized private raisin growers to jointly propose and petition a state commission to approve a marketing program that would restrict competition among the producers in order to maintain prices. The program was to be administered by the commission under authority of a statute which provided penalties for violations of the

program. The Court held that an approved program was immune from the antitrust laws:

> It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. 317 U.S. at 352.

Thus, the principle of state action immunity from antitrust laws was established in a case in which, as here, the formulation and proposal of the program to state authorities was the voluntary collective action of private persons. Indeed, *Parker* stands for the proposition that where the state authorizes private parties to act jointly as an integral part of a state regulatory program, and where the state engages in careful oversight of, and retains final responsibility to approve or disapprove their actions, approved action constitutes state action immune from antitrust liability.

The Court below relied on *Goldfarb* v. *Virginia State Bar Association*, 421 U.S. 773 (1975) and *Cantor* v. *Detroit Edison Co.*, *supra*, as support for its holding that compulsion is necessary for immunity. But *Goldfarb* and *Cantor* were the first state action cases decided by this Court in the more than thirty years after *Parker*. Since 1976, when *Cantor* was decided, there have been a series of cases in which the state action doctrine has evolved and matured. In 1980, in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, *supra*, this

Court reviewed its cases and synthesized from them the following test for state action immunity:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. 445 U.S. at 105 (citing *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (Opinion of Brennan, J.)).

As Judge Hill pointed out in his dissent, in formulating this test, this Court "did not limit its analysis to those cases involving only state defendants, but instead examined all of its major decisions construing the state action exemption" (Pet. App. 82a). As Judge Hill observed:

> The line of cases discussed in this portion of *Midcal* include those involving private defendants, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), as well as those involving governmental defendants, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). After discussing each of these cases, a *unanimous* Court concluded that "[t]hese decisions establish two standards for antitrust immunity under *Parker* v. *Brown*," and proceeded to enunciate the two-part test set forth above. 445 U.S. at 105. . . . The Court did not purport to restrict application of its test to governmental entities; nor did it purport to derive the substance of its test from those cases involving governmental defendants. Indeed, as evidenced by the facts of the present case, to have drawn such a distinction on the basis of the identity of the defendant would have proven unreasonable and inconsistent with the federalism concerns underlying the doctrine" (Pet. App. 82a-83a) (emphasis in original).

As Judge Hill suggests, we submit that *Midcal* is the Court's refinement of *Goldfarb* and *Cantor* into a more flexible and practical test that allows the federal courts to better respond to the complexities of state regulation. While a majority of the Fifth Circuit disagreed with this analysis, the Ninth Circuit reached a similar conclusion in *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813, 823 n. 8 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (1982). There it stated: "It appears that the statement in *Goldfarb* regarding compulsion refers to a combination of the criteria that there be both a clear articulation of state policy and active supervision by the state itself. 421 U.S. at 788-91, 95 S.Ct. at 2013-2015."

Legal scholars have also reached the same conclusion. As Professor Areeda has observed:

> Indeed, *Goldfarb* and *Cantor* may be readily explained as decisions resting not on the absence of compulsion, but rather on the absence of any sort of meaningful state participation in the challenged conduct. In *Goldfarb*, the defendants were private groups enforcing fee schedules without adequate state authority or supervision. The essence of *Cantor* was the state's presumed indifference to the utility's "free" light bulb program; state approval, even if deliberate, was not intended to displace the antitrust laws. Areeda, *Antitrust Immunity for "State Action" After LaFayette*, 95 Harv. L. Rev. 435, 439 n. 19 (1981).

This analysis is borne out by the Court's latest decision in this area, *Hoover* v. *Ronwin*, *supra*. There, the Court again examined its state action decisions beginning with *Parker*. It concluded that when a state legislature adopts legislation or a state supreme court acts in a legislative

capacity, the actions are those of the state and "*ipso facto* are exempt from the operation of the antitrust laws." However, when the anti-competitive conduct is "by others pursuant to state authorization" there must be a clear articulation of policy and active supervision of its implementation. This is the test whether the others be nonsovereign public officials or private persons. As the Court pointed out in *Hoover*, it had applied that test in both *Midcal*, in which the defendant was a state agency, and *Cantor*, in which the defendant was a private party. Referring to those cases, the Court said: "In each of those cases it was necessary for the court to determine whether there had been a clearly articulated and affirmatively expressed state policy because the challenged conduct was not that of the state 'acting as a sovereign.'" 80 L.Ed.2d at 607, n. 33. Thus, the Court clearly rejected the basic premise upon which the decision below rests — that private parties are subject to a different test for state action immunity than are nonsovereign public parties.

CONCLUSION

North Carolina has "clearly articulated and affirmatively expressed" that its policy respecting motor common carriage is to replace unfettered competition with regulation. The fact that its policy contemplates some price competition among parties to a collective rate-making agreement, just as does the corresponding federal policy, does not render that policy violative of the federal antitrust laws. Clearly, too, North Carolina actively supervises its policy. This Court has made clear that if these two facts are present, the state action doctrine immunizes the challenged conduct from the antitrust laws whether or not the defendant is a private

person or a nonsovereign public official and whether or not the conduct is compelled. Therefore, the judgment of the Fifth Circuit, Unit "B", should be reversed.

Respectfully submitted,

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